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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 934

WALTER A. WOOD,

Petitioner,

—v.—

HELENA A. WOOD

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1965

No.

WALTER A. WOOD,

Petitioner,

—v.—

HELENA A. WOOD

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on July 9, 1965.

Opinions Below

The opinions of the New York Supreme Court (W-521–W-560)[1] are reported at 41 Misc. 2d 95 and 41 Misc. 2d 112, respectively. The opinion of the Appellate Division (Appendix; A-P 7–A-P 15) is reported at 21 App. Div. 2d 635. The opinion in the New York Court of Appeals (Appendix, infra, p. 19) is reported at 16 N.Y. 2d 64, 74.

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[1] References in parentheses, unless otherwise indicated, are to folios of the printed record on appeal in the State court. References preceded by the letter "W" are to the Appendix filed by the respondent, Helena A. Wood. References preceded by the letter "H" are to the separate Appendix filed by the petitioner, Walter A. Wood, in the State court. References preceded by the letters "A-P" are to the Additional Papers printed at the end of the Appendix filed by the petitioner, in the State court.

Jurisdiction

The judgment of the Court of Appeals was entered on July 9, 1965, and a timely motion for reargument and/or to amend the remittitur in this case was denied on October 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution and law of the United States.

Question Presented

May a State, without offending the Constitution and law of the United States, recognize a divorce granted by a court of a foreign nation exercising jurisdiction under a statutory provision requiring no significant relationship of either party to the forum but only written consent to jurisdiction by both parties, so as to affect the status and property rights of a subsequent spouse of one of the parties who himself was not a party to the divorce and who is not under State law estopped to challenge the divorce?[2]

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[2] Subsidiary questions include:

(a) Whether due process of law requires that a divorce directly affecting the status and property rights of a person not a party to the proceedings be based on jurisdiction over the subject matter founded on some significant relationship to the forum, such as nationality, domicile, or residence.

(b) Whether due process of law permits a State of the United States to adopt a conflict-of-laws rule, repugnant to theory and practice not only within the United States but throughout the civilized world, under which recognition is given to a judicial decree granted by a State of a foreign nation which has converted an action universally regarded as a local action into a transitory action but has not employed choice-of-law techniques regarded by all civilized nations as required for transitory actions.

(c) Whether the federal concern for order and stability in private international transactions and in the proper functioning of a federal system requires, as a matter of federal law, that a State be precluded from recognizing wholly aberrational foreign rules of law or decrees based thereon that improperly intrude upon relationships within the United States.

Constitutional Provision Involved

Amendment XIV: Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

Respondent, Helena A. Wood, sued her husband, petitioner here, in the New York Supreme Court for a separation (W-8–W-16). By way of defense and counterclaim, he asserted that their marriage was a nullity since her Mexican divorce from a prior husband was invalid, jurisdiction to grant the divorce having been based upon her presence in the jurisdiction for a few hours and her husband's consent[3] (W-17–W-24).

The New York trial judge accepted petitioner's contention and granted an annulment (W-78, 79). However, under a provision of the New York statutes (Dom. Rel. Law §§236, 237), the trial court awarded a substantial sum, by way of support, to Helena Wood. The trial judge clearly recognized and considered the federal questions inherent in the case. In his opinion, he stated, inter alia:

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[3] Pursuant to Article 23 of the Divorce Law of the State of Chihuahua, which authorizes the court to exercise jurisdiction on the basis simply of the "express or tacit submission" of the parties without regard to their residence or domiciles (See Appendix, p. 18). The same statute is relied upon by the Juarez courts in the granting of so-called "mail order" divorces.

> "We accept—we are required to accept—short periods of residence, findings of fact as to domicile or residence of sister states. Would we be required to accept as valid a divorce obtained in a sister state pursuant to its laws where the plaintiff appears in person, that is, is physically present in court, and the defendant appears through attorney where there is no residence requirement or domicile requirement, no finding as to either, and jurisdiction is assumed because the parties 'confer' jurisdiction, that is, give jurisdiction? . . . If we are required to accept such a divorce, it will be only because the Constitution requires it. . . . The State must have 'jurisdiction' before it can act; it cannot be 'given jurisdiction'; and domiciliaries of our State cannot 'renounce' our laws and our control over them. . . . One relying upon such a divorce would need not only the full faith and credit clause in support; he would have to overcome an attack upon it based upon the due process clause of the Fourteenth Amendment."

The Appellate Division reversed (21 App. Div. 2d 635 (1st Dept.)), and the Court of Appeals, by a 4-2 decision, affirmed the Appellate Division (16 N.Y. 2d 64, 74).

In the Court of Appeals, petitioner argued that: (1) due process prohibits a State from rendering or recognizing a foreign divorce based solely on submission (*Alton* v. *Alton*, 207 F. 2d 667 (3rd Cir. 1953)) and that (2) the recognition of such a divorce involves application of an unconstitutional conflict-of-laws rule, and in particular that "if a divorce action was to be treated as a transitory one, the rendering court would be required to apply the law of the domicile of the parties. *Home Insurance Co.* v. *Dick.*" (281 U.S. 402 (1929)) (See Appendix, pp. 47-52)

Petitioner also argued that the decree was not entitled to comity, because jurisdiction was lacking and because it would not qualify for recognition under the Full Faith and Credit Clause even if it were a judgment of a sister State. It is clear, then, that the bearing of constitutional issues and of the related federal concerns on comity was before the court.

It is true that petitioner did not directly argue that the federal concerns implied by comity extended beyond Constitutional aspects to the extent that would justify articulation of a federal conflict-of-laws rule. Such an argument, at this stage of the development of the law, would have been inappropriate before the State court, as it must in the first instance be addressed to this Court. It is noteworthy, however, that Chief Judge Desmond's opinion refers to "act of state," indicating an awareness of a non-Constitutional aspect of comity which has come to be recognized as one of exclusively federal concern. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964); *Republic of Iraq* v. *First National City Bank* (2d Cir. Nov. 8, 1965) in N.Y.L.J., Jan. 11, 1966, p. 1.

Petitioner's motion for reargument, or in the alternative, to amend the remittitur to indicate that federal questions necessarily had been passed upon, was denied on October 28, 1965. In support of the motion for reargument, petitioner again urged that recognition of the Juarez divorce deprived him of rights under the Federal Constitution. (See Appendix, pp. 54-59)

Finally, federal questions are inherent in any case attacking the jurisdiction of a sister-State or foreign court to grant a divorce and questioning the validity of its de-

cree; federal questions are necessarily presented at the outset and, in the very nature of the litigation, cannot be only incidental.

REASONS FOR GRANTING THE WRIT

I. The Questions Involved Are Important.

1. The decision in this and a companion case not before this Court[4] represent the first time that the Court of Appeals of the State of New York has passed on the validity of Mexican divorces of the type here involved—where jurisdiction is based on a fleeting appearance by the moving party and a document signed by the other party consenting to jurisdiction and joining in the prayer for relief. The decision runs counter to commonly held notions of the requirements for a valid divorce throughout the civilized world. Every other State of the United States which has considered the validity of divorces granted by the Mexican divorce mill in circumstances similar to those in the present case has rejected them; nevertheless, this New York decision, should it come in issue in another State,[5] will presumably be required to be respected by other States under the Full Faith and Credit Clause. The opinion also reflects important misconceptions of decisions of this Court under the Full Faith and Credit Clause which ought to be clarified in the interest of preventing this decision from having disturbing repercussions through-

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[4] *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709 (1965).

[5] There is, for example, land in New Jersey in which respondent is asserting a claim of dower which she has refused to relinquish in order to permit petitioner to convey an unencumbered title under a contract of sale already executed.

out the United States. Accordingly, this case is of great importance not only in New York but elsewhere.

2. The importance of the case extends beyond its immediate practical effects because it is highly disturbing as a precedent and, as is elaborated below, is destructive of principles established by this Court with respect to jurisdiction and choice of law which are of major significance in maintaining a workable federal system and in maintaining an appropriate ordering of relationships internationally.

II. The Decision Below Conflicts with Decisions of this Court and of Other Lower Federal and State Courts.

The Court of Appeals, in disposing of this case together with the *Rosenstiel*[6] case, stated that sister-State domiciliary requirements are "in actual practice complied with by a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register."

In other words, the Court of Appeals thought that a Mexican divorce based on submission was comparable to a sister-State divorce.

The fallacy of that reasoning is the nub of this case. Sister-State decrees, unlike the divorce granted in this case, are based on statutes requiring residence or domicile. That is so in every State of the Union. Consequently, where both parties appear in a sister-State divorce, there has been an opportunity to litigate the issue of proper jurisdiction, under a statutory scheme requiring jurisdic-

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[6] *Supra* note 4.

tion to be based on domicile or residence. What the Court of Appeals has done is to overlook the fact that this Court has consistently regarded such statutory requirements as a necessary prerequisite to jurisdiction and to assume, we believe erroneously, that the crucial jurisdictional fact is appearance of both parties, even under a statutory scheme with no pretense of requiring a significant relationship of at least one of the parties to the forum. The novelty and vice of this innovation are evident. Heretofore, compliance with residence requirements has been, in this field, the entire linchpin of jurisdiction. To be sure, if defendant appeared in the divorce proceedings, collateral attack upon compliance with residence requirements is precluded,[7] but if there is no residence requirement to be complied with, the linchpin is removed. In assimilating this case to one in which there was compliance with residence requirements which do exist in all States of the United States, the Court of Appeals misconceived the only questions decided in, and indeed overlooked the whole point of, the cases under the Full Faith and Credit Clause. The Constitutional issues arising out of that oversight present questions requiring certiorari. In our opinion the decision is erroneous for three separate but related reasons. First, in enforcing the Mexican decree against a non-party so as to affect both status and property questions, the decision deprived petitioner of rights guaranteed by due process of law. Second, in recognizing a decree granted under a statute making divorce a transitory action but not providing for the choice-of-law techniques consequently required, not only under New York law but under the law of most civilized nations, the decision deprives the petitioner of rights with-

[7] *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948).

out due process of law. Third, in giving effect to a divorce decree under a statute unquestionably "designed for export," the decision is offensive to order and stability in private international transactions and to the proper functioning of a federal system, and is therefore contrary to what should be regarded as a federal rule of comity which this Court should enunciate. These points are elaborated briefly below.

1. Due process of law precludes the assertion of a divorce decree based on no relationship of the parties to the forum other than their submission, against a person not a party to the proceedings so as to affect his status and property rights.

First, in finding no relevant distinction between a divorce granted on the basis of submission and all the interstate divorces passed on by this Court in the *Williams* cases[8] and later cases, the Court of Appeals overlooked the underlying assumption in all these cases that a divorce is void where rendered, even between the parties, unless some jurisdictional requirement beyond consent to jurisdiction was satisfied. The only divorce case jurisdictionally comparable to this one that has come before this Court is *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955), in which the Court held that the Virgin Islands divorce law there involved, under which residence was theoretically in issue but was not practically relevant,[9] was not a "law of local application" under the Virgin Islands Organic Act.

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[8] *Williams* v. *North Carolina* [*I*], 317 U.S. 287 (1942); *Williams* v. *North Carolina* [*II*], 325 U.S. 226 (1945).

[9] If anything, because the Virgin Islands statute purported to require residence although it made residence irrelevant if both parties appeared, that case was an easier one in which to find that minimal jurisdictional requirements had been satisfied.

But the unwarranted extension of jurisdiction or the use of inappropriate choice-of-law rules is also defective under the Due Process Clause. *E.g., Alton* v. *Alton, supra; Hanson* v. *Denckla,* 357 U.S. 235 (1958); *Home Insurance Co.* v. *Dick, supra;* cf. *Williams* v. *North Carolina* [*II*], 325 U.S. 226 (1945).[10] The question whether the Virgin Islands statute was a law of local application cannot, at least where as here no jurisdictional prerequisite whatsoever beyond consent existed, be rationally distinguished from the question presented by the instant case under the Due Process Clause of the Fourteenth Amendment. It was no aberration, no departure from settled principle, for the Court of Appeals for the Third Circuit, in an opinion by a recognized scholar of Conflict of Laws, to conclude that the Virgin Islands divorce statute was offensive in terms of due process. *Alton* v. *Alton, supra.* Accordingly, in not employing settled standards for testing jurisdiction when a foreign decree is presented for recognition, the New York Court of Appeals has wholly abrogated its reviewing function, contrary to due process as well as to its practice in other cases,[11] and that court should be required to reconsider the jurisdiction of the Mexican court in light of appropriate standards for recognition of a foreign divorce decree.

It should be noted that the interstate divorce cases presuppose a possibility of review in this Court of the divorcing State's finding of jurisdiction. Without that theoretical

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[10] See also Brief of Amicus Curiae, *Granville-Smith* v. *Granville-Smith, supra.*

[11] *Griffin* v. *Griffin,* 327 U.S. 220, 229 (1945); Cf. Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. Chi. L. Rev. 1 (1960), reprinted in Currie, Selected Essays on the Conflict of Laws 526 (1963).

avenue of attack, although it obviously is not exploited in consensual divorces, the res judicata effect to jurisdictional findings would fail. Further, if such review were not available in this Court, it would be a denial of due process to foreclose inquiry into jurisdiction when the divorce was presented for recognition in a sister State.[12]

The universal prerequisite to recognition of foreign judgments is review of the rendering court's jurisdiction, to determine whether jurisdiction existed,[13] and due process of law requires non-recognition of a judgment acquired elsewhere on an invalid jurisdictional basis.[14] For the purpose of this case it is unnecessary to decide whether the appropriate standards for jurisdiction derive from New York law, federal law, or commonly shared views of the civilized world, for by any test the Mexican court lacked jurisdiction, and that is more clearly so when no choice-of-law technique was employed by it.[15]

Second, even if New York can constitutionally recognize the divorce as between the parties to it, it cannot do so

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[12] See *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1931) (by implication); *Sherrer* v. *Sherrer*, *supra*, at p. 348 (by implication); cf. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673 (1930); *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939) (by implication).

[13] See 1 Rabel, The Conflict of Laws: A Comparative Study 531 (2d ed. 1958); Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study, 65 Harv. L. Rev. 193, 227 (1951).

[14] ". . . [D]ue process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Am. Law Inst. Restatement, Judgments, §11, Comment c." *Griffin* v. *Griffin*, *supra*, n. 11, at p. 229; See also, *id.* at p. 232.

[15] See Point 2 of our argument, *infra*.

against a third party. As this Court said in *Riley* v. *New York Trust Co.*, 315 U.S. 343, 354 (1942), where a probate decree of Georgia, based upon a Georgia finding of domicile in Georgia, was sought to be asserted in another State, "if the effect of a probate decree in Georgia in personam was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process." We submit that in this respect there can be no tenable distinction between the *Riley* case and this case.

2. Due process of law forbids a State from recognizing a decree granted under a divorce statute making divorce a transitory action without providing for choice of law appropriate to transitory actions.

Under settled doctrine enunciated by this Court, two significant Constitutional controls over judgments of State courts exist which, in combination, preclude the Court of Appeals from recognizing the Mexican decree. One relates to jurisdiction over the person and the subject matter and the other to choice of law. In this case these two bases of Constitutional infirmity of judicial proceedings need to be considered together, and recognition of the importance of considering their interrelationship will constitute a significant contribution to the ordering of our federal system and to stability in international private transactions.

There have been occasions in the past when this Court could have seen the two problems as one and based its conclusion of Constitutional infirmity on that ground. For example, the Court recently decided that a Florida court lacked jurisdiction when it attempted to strike down the exercise of a power of appointment in a Delaware trust without personal jurisdiction over the trustee.[16] Dissents

[16] *Hanson* v. *Denckla, supra.*

to that opinion argued, however, that emerging doctrines of substituted service for cases in which the forum has some appropriate relation to the controversy, such as activity of the defendant located within the jurisdiction of the forum, would have supported a finding of personal jurisdiction over the trustee. The real vice of what Florida did is better understood when one considers that, for the particular issue presented, Florida attempted to obtain jurisdiction *and* to apply its own law in circumstances in which an appropriate choice of law would have dictated the application of Delaware law.[17] It was this misalliance of incompatible jurisdictional and choice-of-law rules that was offensive. Precisely the same infirmity is presented in this case. Indeed, the dissent by Judge Hastie in the *Alton* case, which for this purpose is another example of the same problem, suggested that if divorce could, as a matter of jurisdiction, be made transitory, then appropriate choice-of-law techniques would have to be developed. Thus, the entire bench of the Third Circuit in the *Alton* case, which in terms of the jurisdictional issues presented is precisely like this case, would have agreed that making divorce transitory but at the same time permitting application of the law of the forum would be Constitutionally objectionable.

We submit that recognition of a judgment embodying this fundamental defect is equally objectionable, and the enunciation by this Court of such a rule will contribute significantly to the promoting of order both within the United States and internationally. The need for such a rule becomes especially acute in light of the growing reliance on "long-arm" legislation. It should be held im-

[17] Cf. Scott, *Hanson* v. *Denckla*, 72 Harv. L. Rev. 695, 700 (1959).

proper, as a matter of the choice-of-law rules which a State may Constitutionally adopt (see *Home Insurance Co.* v. *Dick, supra*) for a State to recognize such a judgment.

3. International comity not only does not require recognition of this divorce but, in the interest of preventing improper intrusions on relationships that are the concern of the United States, requires non-recognition of the divorce, and this Court should enunciate this doctrine as a matter of federal common law binding on the States under the Supremacy Clause.

A federal common law rule, the basis for which we discuss presently, should be enunciated to provide for the international arena mutual restraints on ourselves and on others comparable to the rules that have been fashioned to make relationships within our federal system orderly and workable. More specifically, what is said under Points 1 and 2 of our argument becomes relevant for such a federal rule; what is required by the Due Process Clause should, of course, contribute to the foundation for rules of mutual restraint among nations and as between a foreign nation and a State of the United States. In particular, the misalliance of incompatible jurisdictional and choice-of-law rules should not be permitted in a rendering State, and equally, recognition of a judgment embodying such a fundamental defect should be barred.[18] To maintain international order, restrictions on the rendering of judgments and on the enforcement of judgments are alternative devices for promoting mutual restraint, and, particularly in the international arena, where no single court is supreme, both are necessary. Within the United States, the Due Process

[18] Cf. Brief of Amicus Curiae, pp. 34-44, *Granville-Smith* v. *Granville-Smith, supra.*

Clause and the Full Faith and Credit Clause have performed complementary functions in restricting States in the exercise of jurisdiction and in the application of their own law and in compelling States to recognize the rules and judgments of other States. See, *e.g.*, *Home Insurance Co.* v. *Dick, supra; Hanson* v. *Denckla, supra; Order of United Commercial Travelers* v. *Wolfe,* 331 U.S. 586 (1947); *Milwaukee County* v. *M.E. White Co.,* 296 U.S. 268 (1935). Comparable rules, probably necessarily somewhat different in content to take account of the difference in context, should be developed, under the Due Process Clause and a federal common law, for significant international transactions. Among the significant matters that should fall within that area in which "the nation [should be enabled] to speak with one voice," Moore, Federalism and Foreign Relations, [1965] Duke L.J. 248, 285, are questions "relating to recognition of foreign judgments." Ibid. As a corollary, judgments based on improper jurisdictional standards and improper choice-of-law rules should be struck down. Cf. *Griffin* v. *Griffin, supra; Granville-Smith* v. *Granville-Smith, supra; Alton* v. *Alton, supra.*

The foundation for development of a federal common law in this area was clearly recognized by this Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).[19] The problem of recognition of judgments is one peculiarly suitable for judicial elaboration without the aid of Congressional or executive assistance, which in any event is not likely to be forthcoming. That the recognition of foreign judgments is a matter as to which there ought to be uniform federal rules binding upon the States has often

[19] See also *Republic of Iraq* v. *First National City Bank, supra.*

been suggested,[20] and, indeed, it has been suggested recently that a principal reason why such a development has not yet occurred is simply that the federal rule announced by this Court in *Hilton* v. *Guyot*, 159 U.S. 113 (1895), seemed to some courts to announce a doctrine of reciprocity inappropriate for the modern period. See Moore, Federalism and Foreign Relations, *supra*, at 265. "If *Hilton* was erroneously decided, then the solution is to change the federal rule, not to encourage a hodgepodge of independent state rules. In any event, the independent state positions regarding the problem, although perhaps more enlightened on the merits, have failed to achieve the foreign relations goal sought, namely the recognition of United States judgments abroad by reciprocity nations. Thus, the lesson of *Hilton* reaffirms that the voice of foreign relations must be a federal voice." Ibid.

To be sure, divorce is a matter reserved to the States in our federal system. But the recognition of the divorces of other States and nations has long been acknowledged to be of intense national concern; the interest in the stability of personal relationships within the nation has frequently required this Court to act in order more perfectly to assure that the appropriately concerned States, as to the various issues presented, would have the legislative competence allocated to them by the Constitution. Compare *Williams* v. *North Carolina* [*I*], 317 U.S. 287 (1942), with *Estin* v. *Estin*, 334 U.S. 541 (1948), and *Armstrong* v. *Armstrong*, 350 U.S. 568 (1956). Federal rules of recognition and non-recogni-

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[20] *E.g.*, Reese, The Status in This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783, 788 (1950); Moore, Federalism and Foreign Relations, [1965] Duke L.J. 248, 265. See, generally, Friendly, In Praise of Erie—and of the New Federal Common Law, 19 Record of N.Y.C.B.A. 64 (1964), 39 N.Y.U.L. Rev. 383 (1964).

tion of divorce are required, as this Court has often recognized, see especially *Williams* v. *North Carolina* [*II*], 325 U.S. 226, 231 n. 7 (1945), and our place in the civilized world requires that comparable federal attention be given to the recognition of foreign divorce decrees.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX A

Mexican Legislation

Divorce Law of the State of Chihuahua, Mexico

Art. 23. Competence may also be fixed by express or tacit submission. Express submission exists when the parties concerned renounce clearly and conclusively that forum which the law accords to them, and designate with all precision the judge to whom they submit. Tacit submission exists by the fact that the plaintiff files his complaint, or by the fact that the defendant, after having been summoned in proper form, does not timely raise the lack of competence, or after having raised it, desists therefrom.

APPENDIX B

Opinions and Judgment of the Court of Appeals

LEWIS S. ROSENSTIEL, Appellant, *v.* SUSAN L. ROSENSTIEL, Respondent.

SUSAN L. ROSENSTIEL, Respondent, *v.* LEWIS R. ROSENSTIEL, Appellant.

HELENA A. WOOD, Respondent-Appellant, *v.* WALTER A. WOOD, Appellant-Respondent.

Decided July 9, 1965

I. *Rosenstiel* v. *Rosenstiel*

BERGAN, J. The defendant wife's former husband Felix Ernest Kaufman in 1954 obtained a divorce from her in a district court at Juarez in Chihuahua, Mexico. Plaintiff and defendant were married in New York in 1956 and this action by the husband seeks to annul that marriage on the ground the 1954 divorce is invalid and that, therefore, the defendant wife was incompetent in 1956 to contract a marriage.

In seeking the divorce in Mexico Mr. Kaufman went to El Paso, Texas, where he registered at a motel and the next day crossed the international boundary to Juarez. There he signed the Municipal Register, an official book of residents of the city, and filed with the district court a certificate showing such registration and a petition for divorce based on incompatability and ill treatment between the spouses.

After about an hour devoted to these formalities, Mr. Kaufman returned to El Paso. The following day his wife, the present defendant, appeared in the Mexican court by an attorney duly authorized to act for her and filed an answer

in which she submitted to the jurisdiction of the court and admitted the allegations of her husband's complaint. The decree of divorce was made the same day. The judgment is recognized as valid by the Republic of Mexico.

The Divorce Law of the State of Chihuahua provides that the court may exercise jurisdiction either on the basis of residence or of submission. Article 22 provides that the Judge "competent to take cognizance of a contested divorce" is the Judge "of the place of residence of the plaintiff" and of a divorce "by mutual consent", the Judge "of the residence of either of the spouses".

For the purposes of article 22, the statute further provides that the residence "shall be proven" by the "certificate of the Municipal Register" of the place (art. 24). Article 23, which has application to *Wood* v. *Wood,* provides that judicial competence "may also be fixed" by express or tacit submission.

After a trial at Special Term in the present husband's action for annulment, the court, holding that New York would not recognize the Mexican decree, granted judgment for the plaintiff and annulled the marriage; the Appellate Division reversed this judgment and dismissed the complaint.

In the background of this problem is a long series of decisions over a period of a quarter of a century in the New York Supreme Court at Appellate Division and at Special Term recognizing the validity of bilateral Mexican divorces which we consider has some relevancy to the question be-

fore us.[1] No New York decision has refused to recognize such a bilateral Mexican divorce.

It has been estimated that many thousands of persons have been affected in their family and property status by these decisions (cf. Flint, Divorce by Personal Jurisdiction of the Parties—A Support for the Mexican Bi-lateral Divorce, 29 Albany L. Rev. 328, and Report of the Joint Legislative Committee on Matrimonial and Family Laws, N. Y. Legis. Doc., 1957, No. 32; *id.*, N. Y. Legis. Doc., 1961, No. 19). In this respect the problem in New York differs somewhat from that in New Mexico, New Jersey and Ohio which have as a matter of their own public policy refused to accept as valid such Mexican divorces (*Golden* v. *Golden*, 41 N. M. 356; *Warrender* v. *Warrender*, 42 N. J. 287; *Bobala* v. *Bobala*, 68 Ohio App. 63).

There is squarely presented to this court now for the first time the question whether recognition is to be given by New York to a matrimonial judgment of a foreign country based on grounds not accepted in New York, where personal jur-

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[1] *Kantrowitz* v. *Kantrowitz*, 21 A D 2d 654; *Matter of Klemas* v. *Klemas*, 20 A D 2d 530; *Heine* v. *Heine*, 19 A D 2d 695, affg. 231 N. Y. S. 2d 239; *Busk* v. *Busk*, 18 A D 2d 700, affg. as mod. 229 N. Y. S. 2d 904; *Sonnenberg* v. *Sonnenberg*, 203 N. Y. S. 2d 118, app. dism. 11 A D 2d 1024; *Laff* v. *Laff*, 4 A D 2d 874, affg. 5 Misc 2d 554; *Weibel* v. *Weibel*, 37 Misc 2d 162; *Millman* v. *Millman*, 27 Misc 2d 669; *Skolnick* v. *Skolnick*, 24 Misc 2d 1077; *Bowen* v. *Bowen*, 22 Misc 2d 496; *Fricke* v. *Bechtold*, 8 Misc 2d 844; *Mitchell* v. *Mitchell*, 194 Misc. 73; *Matter of Fleischer*, 192 Misc. 777; *Costi* v. *Costi*, 133 N. Y. S. 2d 447; *Caswell* v. *Caswell*, 111 N. Y. S. 2d 875; *Mountain* v. *Mountain*, 109 N. Y. S. 2d 828; *Katz* v. *Katz*, N. Y. L. J., May 8, 1964, p. 16, col. 8; *Ocker* v. *Ocker*, N. Y. L. J., April 16, 1964, p. 19, col. 4; *Walker* v. *Walker*, N. Y. L. J., Jan. 14, 1964, p. 16, col. 5.

isdiction of one party to the marriage has been acquired by physical presence before the foreign court; and jurisdiction of the other has been acquired by appearance and pleading through an authorized attorney although no domicile of either party is shown within that jurisdiction; and "residence" has been acquired by one party through a statutory formality based on brief contact.

In cases where a divorce has been obtained without any personal contact with the jurisdiction by either party or by physical submission to the jurisdiction by one, with no personal service of process within the foreign jurisdiction upon, and no appearance or submission by, the other, decision has been against the validity of the foreign decree (*Caldwell* v. *Caldwell,* 298 N. Y. 146 [1948]; *Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371 [1955]).

Although the grounds for divorce found acceptable according to Mexican law are inadmissible in New York, and the physical contact with the Mexican jurisdiction was ephemeral, there are some incidents in the Mexican proceedings which are common characteristics of the exercise of judicial power.

The former husband was physically in the jurisdiction, personally before the court, with the usual incidents and the implicit consequences of voluntary submission to foreign sovereignty. Although he had no intention of making his domicile there, he did what the domestic law of the place required he do to establish a "residence" of a kind which was set up as a statutory prerequisite to institute an ac-

tion for divorce. This is not our own view in New York of what a bona fide residence is or should be, but it is that which the local law of Mexico prescribes.

Since he was one party to the two-party contract of marriage he carried with him legal incidents of the marriage itself, considered as an entity, which came before the court when he personally appeared and presented his petition. In a highly mobile era such as ours, it is needful on pragmatic grounds to regard the marriage itself as moving from place to place with either spouse, a concept which underlies the decision in *Williams* v. *North Carolina I* (317 U. S. 287; see, especially, Justice FRANKFURTER's concurrence p. 304).

The voluntary appearance of the other spouse in the foreign court by attorney would tend to give further support to an acquired jurisdiction there over the marriage as a legal entity. In theory jurisdiction is an imposition of sovereign power over the person. It is usually exerted by symbolic and rarely by actual force, e.g., the summons as a symbol of force; the attachment and the civil arrest, as exerting actual force.

But almost universally jurisdiction is acquired by physical and personal submission to judicial authority and in legal theory there seems to be ground to admit that the Mexican court at Juarez acquired jurisdiction over the former marriage of the defendant.

It is true that in attempting to reconcile the conflict of laws and of State interests in matrimonial judgments entered in States of the United States, where the Constitu-

tion compels each to give full faith and credit to the judgments of the others, a considerable emphasis has been placed on domicile as a prerequisite to that compulsory recognition (*Williams* v. *North Carolina I, supra;* Michael Cardozo, Divorce Without Domicile, 39 Cornell L. Q. 293, 301). But domicile is not intrinsically an indispensable prerequisite to jurisdiction (cf. Stimson, Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory, 42 Amer. Bar Assn. J. 222 [1956]; Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study, 65 Harv. L. Rev. 193, 228).

The duration of domicile in sister States providing by statute for a minimal time to acquire domicile as necessary to matrimonial action jurisdiction, is in actual practice complied with by a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register. The difference in time is not truly significant of a difference in intent or purpose or in effect.

The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

Nevada gets no closer to the real public concern with the marriage than Chihuahua. New York itself will take jurisdiction of a matrimonial action without regard to domicile or residence if it happened, by mere fortuity,

that the marriage was contracted here, even between people entirely foreign to our jurisdiction (Domestic Relations Law, § 170, subd. 2; see, e.g., *David-Zieseniss* v. *Zieseniss*, 205 Misc. 836; *Becker* v. *Becker*, 58 App. Div. 374).

A leading New York decision on the recognition of a divorce granted in a foreign nation where we are under no constitutional compulsion to give full faith and credit is *Gould* v. *Gould* (235 N. Y. 14 [1923]) and there the court sustained a judgment of divorce in France between parties not domiciled in France at a time when the husband, who instituted the French action, was domiciled in New York. Indeed, the New York law was applied by the French court because "the plaintiff Gould" was a resident of New York (p. 21).

The decision is not a clear precedent for the case now at bar; there are differences, e.g., the parties had substantial personal ties with France; the ground for the French divorce was the New York law; and this court laid down a number of precautionary warnings about the scope of its decision and what it was leaving open (pp. 29, 30).

Still the fact is that this court accepted as valid a judgment affecting marital status of a New York domiciliary granted by a court in a foreign nation, without requiring domiciliary status in that nation; and this aspect of the decision does have relevance here since it is not helpful on the question of French jurisdiction that the French court acted on its conception of New York law. It applied New York law for the very reason that Gould was not a domiciliary of France but of New York.

The opinion in *Caldwell* v. *Caldwell* (298 N.Y. 146, supra), dealing with divorces obtained on no personal presence or submission by either party in Mexico, the "mail-order decree", discusses domicile, but the question was not decisive of that case (cf. dissenting opinion, CONWAY, J., Matter of *Rathscheck*, 300 N. Y. 346, 355).

A balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy of this State.

The order should be affirmed, with costs.

II. *Wood* v. *Wood*

Although the Mexican decree of divorce in *Wood* v. *Wood* was entered under a provision of the Chihuahua Divorce Law (art. 23) which does not require proof of registration as a resident and which allowed jurisdiction to be taken by submission, the personal appearance in Chihuahua before the court of one party and the appearance through a duly authorized attorney by the other, require that for the purposes of New York public policy decision in this case be consistent with that in *Rosenstiel.*

On the wife's appeal from an affirmance of the dismissal of her complaint for separation based on cruelty, it is enough to say that if the facts as found and affirmed are accepted it was not error as a matter of law to dismiss the complaint.

The order should be affirmed, with costs, to plaintiff.

Chief Judge DESMOND (concurring in part). Although for reasons hereafter stated I would not void past-granted Chihuahua divorces, I emphatically reject the proposition that New York State must continue to recognize these one-day decrees awarded to our residents in manner and on theories repugnant to our basic ideas.

There is no justification in positive law, public policy, natural justice or morals for a validation by this court of the practice of some of the citizens of our State of going to Mexico for divorces of the sort attacked on these appeals. My vote against recognizing them for the future is based on these self-evident propositions:

1. Divorce decrees rendered in foreign countries and purporting to dissolve New York marriages are entitled to recognition and effect in New York State only when such recognition is consistent with the public policy of our State (*Gould* v. *Gould,* 235 N. Y. 14, 29; *Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375; see *Russian Republic* v. *Cibrario,* 235 N. Y. 255, 259; *Martens* v. *Martens,* 284 N. Y. 363, 365). The *Gould* case (*supra*) is illustrative. There the New York courts upheld a divorce granted in France but only because the parties had actually lived for years in their Paris home and the decree was granted after an actual court contest without collusion and on a ground recognized in New York, that is, adultery.

2. Mexican "bilateral" divorces where one party crosses a bridge from El Paso, Texas, spends a day in Juarez and, by arrangement, the other appears by attorney, followed by a *pro forma* one-hour court appearance with no real

hearing, or persuasive evidence or independent judicial determination lack almost all the elements which New York State considers requisites for a valid divorce. The residence requirements of the State of Chihuahua are minimal and inadequate to form a recognizable domiciliary jurisdictional base since in Mexico and contrary to our views neither spouse need have a true or real domicile in Mexico (see *Williams* v. *North Carolina,* 325 U. S. 226, 229-230; *Estin* v. *Estin,* 296 N. Y. 308, 312, affd. 334 U. S. 541). Domicile as the law uses the term means a fixed, permanent and principal home to which a person wherever temporarily located always intends to return (Black's Law Dictionary, 4th ed.).

3. No attention is paid in Juarez divorces to the principle, fundamental with us, that marriage is an institution in which the public as a third party has a vital interest (*Fearon* v. *Treanor,* 272 N. Y. 268; *Maynard* v. *Hill,* 125 U. S. 190; 2 Bishop, Marriage, Divorce and Separation, § 480). The Mexican State does not concern itself with maintenance of the marriage or reasons for its dissolution. In these latter respects the one-day judgments here attacked differ in no essential respect from the mail-order writs described in *Caldwell* v. *Caldwell* (298 N. Y. 146).

4. Such decrees are blatantly and obviously the fruit of consensual divorce arrangements and as such are forbidden by New York public policy statute (now General Obligations Law, § 5-311; see *Caldwell* v. *Caldwell,* 298 N. Y. 146, 150, *supra; Viles* v. *Viles,* 14 N Y 2d 365).

5. Although there is a line of lower court decisions in the State upholding these "Chihuahua" decrees (e.g., *Leviton* v. *Leviton,* 6 N. Y. S. 2d 535, 254 App. Div. 670) they are, so we are told and so it would seem, refused recognition everywhere else (see *Warrender* v. *Warrender,* 42 N. J. 287; *Golden* v. *Golden,* 41 N. M. 356; *Bobala* v. *Bobala,* 68 Ohio App. 63; *Bethune* v. *Bethune,* 192 Ark. 811; Griswold, Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study, 65 Harv. L. Rev. 193; 1 Rabel, Conflict of Laws [2d ed., 1958] p. 513). Approval of these lower court decisions puts our State in the uneasy and inappropriate position of sole acceptor of Mexican "quickie" divorces. The suggestion in the majority opinion that these trial court and Appellate Division decisions, together with the fact that Mexico has issued numerous divorces to New Yorkers, plus the fact of advice by New York attorneys to their clients, force this court into a totally wrong public policy is a suggestion that answers itself. We are forgetting that the public policy of this State as to divorce "exists to promote the permanency of the marriage contracts and the morality of the citizens of the state" (*Hubbard* v. *Hubbard,* 228 N. Y. 81, 85).

Of course, it is in the modern manner to shrug off all this, to ask what is the difference between a one-day "domicile" in Juarez and a six weeks' "domicile" in Reno, to pile scorn and ridicule on New York's one-ground divorce law as archaic, cruel or worse. The approach is too facile. For 160 years New York as a State has recognized one cause only for divorce (Domestic Relations Law, § 170) and has

refused to approve the practice of its domiciliaries going to other jurisdictions to evade our laws by obtaining divorces after short sojourns and on grounds not cognizable here (*Jackson* v. *Jackson,* 1 Johns. 424 [1806]). This official position of our State stands not on mere parochialism but on some of the oldest and deepest-felt sentiments of humanity. As Lord MANSFIELD wrote long ago: "Matrimony was one of the first commands given by God to mankind after the Creation, repeated again after the Deluge, and ever since echoed by the voice of nature to all mankind." Seventy-seven years ago in *Maynard* v. *Hill* (125 U. S. 190, 205, *supra*) the United States Supreme Court referred to marriage as creating the most important relation in life and as having more to do with the morals of a civilized people than any institution, and pointed out that while marriage is in a sense a contract, it " 'partakes more of the character of an institution controlled by public authority, upon principles of public policy, for the benefit of the community' " (Justice FIELD at pp. 205 and 213 of 125 U. S.) There can be no doubt that this speaks the public policy of our State to be changed only by the people through Constitution or statute. No court is licensed to write a new State policy, however attractive or convenient. As to divorces gotten in other States of the Union we are constrained to recognition by modern constructions of the Federal full faith and credit clause. But when asked to recognize divorces rendered in foreign countries we as a court have neither right nor need to look beyond our own declared and unmistakable State policy (*Martens* v. *Martens,* 284 N. Y. 363, 365, *supra; Caldwell* v. *Caldwell,* 298 N. Y. 146, *supra*).

As to analogizing the one-day Mexican divorce to the six weeks' Nevada decree, the first and ready answer is that judgments from other States are given faith and credit here because the Federal Constitution so commands. The second answer is a substitution of the true analogy, that is, between one-day foreign divorces and post-card foreign divorces, as between which there is no logical or real difference at all (see *Warrender* v. *Warrender,* 79 N. J. Super. 114, affd. 42 N. J. 287, *supra*).

It is suggested, too, that a Juarez divorce is some sort of official "act of State" of a sovereign foreign power and, as such, safe from our scrutiny or ban. That might be so as to Mexico divorcing her own citizens. But our recognition of any foreign judgments is a mere act of official courtesy, implying no surrender of our own sovereignty. There is no compulsion. Were we to give credit to these Mexican judgments we would as a court be turning our backs on New York's restrictive divorce policy and allowing the divorce of our own citizen-residents by a foreign government having no interest in the marriage *res.*

For these reasons I vote for a declaration that such divorces are void, but I am not bound to and do not vote to give this ruling any more than prospective effect. I cannot shut my eyes to the realities. Tens of thousands of such purported divorces have been granted to New Yorkers who acted on advice of attorneys who relied on 25 years of decisions by the New York lower courts. No social or moral purpose would now be served by ruling that marriages long ago dissolved are still in existence, and the result

would be destructive to the present homes, marriage and lives of those who remarried on the strength of Juarez decrees. This court has a clear right to give our ruling prospective effect only (see *Lyon* v. *Richmond*, 2 Johns. Ch. 51; *Harris* v. *Jex*, 55 N. Y. 421; *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358; *Linkletter* v. *Walker*, 33 U. S. L. W. 4576) and justice and fairness dictate that we should do so and refuse to allow these plaintiffs or others to attack collaterally such past-rendered Mexican "one-day" divorces.

None of the other points made by counsel requires discussion herein.

In each case the order should be affirmed, with costs, but with the clear understanding that divorces of this sort granted after the date of the decision of these appeals will be void in New York State.

Scileppi, J. (dissenting). I agree with the Chief Judge inasmuch as he would hold that these divorces are void; however, I would permit the present appellants to succeed on this appeal.

As we analyze the cases in this area, we must be ever mindful that we are not dealing with a decree of a sister State, but with one of a foreign nation. Decrees of a foreign nation are not only not entitled to full faith and credit, but are not even entitled to prima facie validity despite any allegation of jurisdiction which may appear on the face of the judgment (*Rosenbaum* v. *Rosenbaum*, 309 N. Y. 371, 375). *The sole criterion by which these decrees may be*

judged is whether they contravene our public policy (*Rosenbaum* v. *Rosenbaum,* 309 N. Y. 371, 375, *supra*).

It is fundamental to our concepts of jurisprudence that a court which purports to act must have jurisdiction over the subject matter of the action. The general rule has become firmly established that jurisdiction over the subject matter of an action for divorce depends upon the domicile of at least one party in the decree rendering forum (*Senor* v. *Senor,* 272 App. Div. 306, 310-311, affd. 297 N. Y. 800; *Solotoff* v. *Solotoff,* 269 App. Div. 677; see, also, *Matter of Lindgren,* 293 N. Y. 18, 24).

In *Williams* v. *North Carolina I* (317 U. S. 287, 298) the Supreme Court held that domicile of one party creates an adequate relationship with a State to justify its exercise of power over the marital relationship. And in *Williams* v. *North Carolina II* (325 U. S. 226, 229-230) Mr. Justice FRANKFURTER had the following to say about this fundamental concept: "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell* v. *Bell,* 181 U. S. 175; *Andrews* v. *Andrews,* 188 U. S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v.

North Carolina, supra, the jurisdictional requirement of domicil is freed from confusing refinements about 'matrimonial domicil,' see *Davis* v. *Davis,* 305 U. S. 32, 41, and the like."

Relying heavily on *Williams II,* the Third Circuit (per GOODRICH, J.) held that domicile is the indispensable element of divorce jurisdiction (*Alton* v. *Alton,* 207 F. 2d 667, 677, judgment vacated and the proceeding dsmd. as moot 347 U. S. 610).

To characterize one as a "domiciliary" is to clothe him with the strongest possible ties to a jurisdiction. However, this court has held that domicile, in a strict sense, is not required before a foreign nation may render a divorce decree affecting our citizens (*Gould* v. *Gould,* 235 N. Y. 14)[1]. In that case, husband and wife, New York domiciliaries, moved to France, purchased a house and dwelt there for five years. After this period, the husband brought suit for divorce in France on the ground of adultery, and judgment in his favor was rendered by the French court, applying New York law. On a motion for judgment on the pleadings in an action for divorce by the wife in New York, this court, carefully limiting itself to the circumstances of the case, held that Special Term was correct in declaring that the French decree did not offend our public policy and was entitled to recognition under rules of comity (p. 29). The court (per HOGAN, J.) emphasized the undisputed fact that

[1] For a discussion of this case including comments by scholars in the area consult 1 Rabel, The Conflict of Laws: A Comparative Study (2d ed., 1958), p. 531.

the parties had established a bona fide residence in France, and, in the concluding paragraph of the opinion, took pains to note: "If in the instant case the judgment of the courts of France disclosed that the parties were merely sojourning in France at the time the decree of divorce was granted, or that a residence in France was of such limited duration as to lead the Supreme Court to believe that the decree was the result of collusion, or the judgment was rendered for a cause not recognized as sufficient cause for absolute divorce by the law of this State, it may be that the justice presiding would be justified in holding that the decree was contrary to the policy of this state and in a refusal to give effect to the evidence sought to be established thereby. We leave those questions open." (*Gould* v. *Gould*, 235 N. Y. 14, 29-30, *supra*). It is obvious, therefore, that New York requires that there be a relationship of substantial permanence between the decree rendering nation and the subject matter of the action, the marital *res*. Lack of jurisdiction over the subject matter of a controversy cannot, of course, be cured by the mere personal appearance of the parties (*Matter of Lindgren*, 293 N. Y. 18; *Solotoff* v. *Solotoff*, 269 App. Div. 677).

Would the public policy of our State be served by departing from that well-established rule? I do not believe so. Illustrative of the many cases emphasizing the vital stake which the State has in every marriage contract is *Fearon* v. *Treanor* (272 N. Y. 268) wherein this court stated (pp. 272-273):

"Marriage is more than a personal relation between a man and woman. It is a status founded on contract and

established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State. 'Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure of form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.' (*Maynard* v. *Hill,* 125 U.S. 190, 205.)

"There are, in effect, three parties to every marriage, the man, the woman and the State. (*Trammell* v. *Vaughan,* 158 Mo. 214.) * * * The Domestic Relations Law provides in great detail when and how marriage may be entered into, how the relation may be dissolved, the grounds for divorce and annulment, the rights and liabilities of husband and wife, the age at which the relation may be entered into and the class of persons who are disqualified from marrying.

"From time immemorial the State has exercised the fullest control over the marriage relation, justly believing that happy, successful marriages constitute the fundamental basis of the general welfare of the people."

In addition, Justice DOUGLAS in *Williams* v. *North Carolina I* (317 U. S. 287, 298-299) stated: "Each state as a sovereign has a rightful and legitimate concern in the mari-

tal status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interest, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent."

Faced with this overwhelming interest of the State in the marital relationship, an interest which our State still maintains even in a "highly mobile era", we should not discard the rule that jurisdiction over the subject matter of a divorce action requires a substantial relationship between the decree rendering jurisdiction and the marital *res*.

It is anomalous, indeed, that we are today upholding a one-day Mexican divorce decree while several of our sister States, which afford grounds for divorce not afforded by us, have refused to recognize such a decree. As recently as 1963, New Jersey, in *Warrender* v. *Warrender* (79 N. J. Super. 114, affd. on op. below 42 N. J. 287), declared that a decree of divorce rendered in Juarez upon the personal appearance of the plaintiff and appearance by attorney of the defendant was void. The court observed that "there is no basis for according greater recognition to a Mexican divorce on a one-day appearance than to the mail-order variety" (79 N. J. Super. 118).

Appendix B—Opinions and Judgment of the Court of Appeals

In 1940 the Ohio Court of Appeals had occasion to rule on the bilateral Mexican divorce (*Bobala* v. *Bobala*, 68 Ohio App. 63). Having analyzed the problem along the lines of subject matter jurisdiction, concluding that the Mexican court was not possessed of such jurisdiction, and determining that the consent of the parties could not confer it, the court held that comity would not be extended.[2]

Professor Rabel observes that in spite of the many concepts of jurisdiction which the different systems of jurisprudence espouse, one condition required by all when they concern themselves with the recognition of foreign judgments of divorce overshadows all differences, "viz, that the court of judgment must have had jurisdiction in the international sense, i.e., according to the conceptions of the forum where recognition is sought" (1 Rabel, The Conflict of Laws: A Comparative Study [2d ed., 1958], p. 531). This court has unequivocally embraced the principle of jurisdiction in the international sense when we required the invocation of the jurisdiction of a foreign court "as we understand those terms" (*Caldwell* v. *Caldwell*, 298 N. Y. 146, 150). In that case we held that where neither spouse was before the court, a divorce rendered by a Mexican court which had acquired personal jurisdiction over *both* parties by virtue of the appearance of two properly empowered Mexican attorneys was void. However, I cannot emphasize too strongly that the decree was valid in Mexico. In other words, a decree may be valid where rendered yet not be

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[2] Compare *Golden* v. *Golden* (41 N. M. 356) with *Ferret* v. *Ferret* (55 N. M. 565).

entitled to recognition in New York, if it offends our public policy. (*Caldwell* v. *Caldwell*, 298 N. Y. 146, *supra*.)

As this court noted in *Caldwell* (p. 150): "There is not even the slightest semblance or color of jurisdiction justifying action by a court. The spouses here never submitted themselves to nor invoked the jurisdiction of a court of a foreign nation *as we understand those terms*. They violated our statute embodying our public policy (Domestic Relations Law, § 51). Their collusive agreement and conduct may not be the foundation for the creation of any rights." (Emphasis supplied.)

Since we in New York recognize the acquisition of personal jurisdiction by the personal appearance of a properly authorized attorney, and since *Caldwell* unequivocally denounces the lack of jurisdiction "as we understand those terms", that case must, of necessity, denounce the lack of jurisdiction ("as we understand those terms") over the subject matter of the action, i.e., the marital *res*, as fatal.

Therefore, under the well-grounded concepts of jurisdiction over the subject matter, and jurisdiction in the international sense as delineated by Rabel and as embraced by this State (until today) in *Caldwell* (*supra*), and relying upon *Caldwell* itself, I would hold that it is against the public policy of New York to recognize the divorce decree of a foreign nation when such decree is not based upon jurisdiction over the subject matter, i.e., when there is no relationship of any degree of permanence between the marital *res* and the decree rendering jurisdiction. Obviously,

the interest and concern which New York has in the marriage of its citizens are infinitely greater than Mexico's. I am unwilling to hold that, although our public policy is violated when a husband and wife execute powers of attorney and mail them to Mexican attorneys, it is not violated when one spouse, armed with the other's power of attorney, makes a momentary physical appearance in Juarez, which, in the language of the majority, is nothing more than "ephemeral".

I am convinced that, with the decision in this case, this court has rekindled the spark still burning in the breasts of some that so-called Mexican mail-order decrees may one day be recognized as valid in this State. I agree with the Chief Judge that there is no distinction of substance between mail-order decrees and the decrees which have received the stamp of approval in the cases before us. Indeed, if the Mexican courts are jurisdictionally empowered to sever the matrimonial bonds of New York residents upon what the majority concedes to be a most flimsy jurisdictional basis, I fail to see why they are not jurisdictionally empowered to sever those bonds by mail with the virtue at least of its resultant economic benefit of avoiding the necessity of even a one-day trip.

In the briefs, great reliance was placed upon the following statement in *Matter of Rhinelander* (290 N. Y. 31, 36-37): "It is no part of the public policy of this State to refuse recognition to divorce decrees of foreign states when rendered on the appearance of both parties, even when the parties go from this State to the foreign state for the pur-

pose of obtaining the decree and to obtain it on grounds not recognized here. (*Glaser* v. *Glaser* [276 N. Y. 296], *supra*, p. 302.)" This statement can afford the respondents little comfort because it does not address itself to the situation, as in the case at bar, where the rendering court lacks subject matter jurisdiction as we know it. Once such jurisdiction is posited, the statement is true. The citation to *Glaser* v. *Glaser* (276 N. Y. 296) bears out this view because, in *Glaser*, the New York trial court found as a fact that defendant " 'duly became a resident of the State of Nevada' " (p. 299), thus giving Nevada a jurisdictional predicate upon which to act.

In my opinion, recognition should not be given to the decree of any foreign country affecting the marital status of New York domiciliaries where the plaintiff in the decree granting country did not and never intended to sever his ties with this State unless, as in *Gould* (*supra*), he had very substantial ties in that country. I say this not because I feel that there is anything sacred about the concept of domicile, but because I feel that there is something sacred about marriage; and because I feel that no foreign country has, or should be recognized as having, the power to dissolve such a relationship between New York citizens when, in no inconsiderable number of cases, the irreparably destructive effects of such dissolution are to be borne in part by *all* of the people of this State and because I feel that the public policy of this State, which has remained unchanged these many years, absolutely compels us to refuse to acknowledge the existence of such power in any foreign country.

I agree with the majority that "our public interest is not affected differently by a formality of one day than by a formality of six weeks" and that "Nevada gets no closer to the real public concern with the marriage than Chihuahua" (p. 73). But—and this distinction is crucial—in the case of a sister State we are *compelled* to give full faith and credit to its decrees. In the case of a foreign country we are not compelled to do so and should not voluntarily recognize its decrees.

So-called "realities of life" and "contemporary experience", assuming that such considerations may be accurately assessed, which I doubt, are not reliable bases for determining public policy. That some, perhaps many, choose to treat their marriage contract with the same indifference that they would a commercial contract does not mean that we should indorse such conduct.

In addition to abandoning the requirement that a court which affects the marital status of our citizens should have subject matter jurisdiction, the majority has chosen to ignore the basic concepts and value judgments which permeate our Domestic Relations Law. The Legislature has seen fit to permit divorce in this State only because of the adultery of the defendant (Domestic Relations Law, § 170). This is certainly indicative of a design to restrict the availability of divorce and in so doing to preserve the family unit. Such preservation is considered vital and indispensable to the welfare and stability of the family, the ultimate goal being a climate conducive to the better development of our society. This court has a duty not to

sanction the casual and consensual dissolution of the marriage contract by two of the three parties interested therein. This is especially true in light of the clear public policy announced in section 5-311 of the General Obligations Law, and in *Viles* v. *Viles* (14 N Y 2d 365). To recognize these divorces is to disregard the traditionally solemn nature of the marriage contract (see *Fearon* v. *Treanor,* 272 N. Y. 268, *supra*), legislative pronouncements e.g., Domestic Relations Law, § 170; General Obligations Law § 5-311), and decisions of this court (e.g., *Viles* v. *Viles, supra; Caldwell* v. *Caldwell,* 298 N.Y. 146, *supra*).

I am fully aware that a vast number of our citizens, relying upon the pronouncements below, have remarried, established families, acquired property, and engaged in many activities, personal and financial, as husband and wife. To accord this decision traditional retroactive effect would indeed have a profoundly convulsive and disruptive effect on our State, and on our citizens, who acted in good faith reliance on the law as enunciated below. However, to hold this divorce valid merely because our lower courts have been recognizing similar ones as such, and because many have placed reliance on those decisions, is no answer to the public policy considerations presented in this case. If this divorce is void, we should say so regardless of these prior decisions in our lower courts.[3] Nonetheless, I also recognize that there are public policy considerations which should be taken into account concern-

[3] In this connection we should recall that this is the first time that we have had this question before us, and that this court has no power to issue advisory opinions.

ing parties who have already obtained such divorces in reliance upon those decisions. Therefore, again as a matter of public policy, I would hold that, although Mexican divorce decrees of this type are void, this decision should not be applied retroactively. It is certainly within our power as the highest court in the State to give a decision such effect and not violate the Federal Constitution (*Great Northern Ry.* v. *Sunburst Co.*, 287 U.S. 358, 364). I point out that this is a case where there are overriding and compelling reasons of public policy for refusing to give retrospective effect. I note that no one is being injured and no established rights are being impaired by such a disposition.

The doctrine of prospective application is a device which I believe should be invoked only in the most compelling circumstances. Such circumstances are here presented. The doctrine has been applied in Michigan (*Parker* v. *Port Huron Hosp.*, 361 Mich. 1), when the court renounced charitable immunity for nonprofit hospitals, noting: "we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of the filing of this opinion" (361 Mich., p. 28). The Illinois court had occasion in *Molitor* v. *Kaneland Community Unit Dist. No. 302* (18 Ill. 2d 11) to take the same approach in a similar immunity case, i.e., school districts were held liable in negligence to the plaintiff therein and to future plaintiffs. Wisconsin too, motivated by deep considerations of public policy, saw fit to abolish immunity of charitable hospitals prospectively only and to follow *Molitor* in giving the litigants

then before the court the benefit of the ruling. (*Kojis* v. *Doctors Hosp.*, 12 Wis. 2d 367.)

In sum, for reasons of public policy, I would give this decision prospective effect only but would permit the appellants here to reap the benefits of the appeal for the reasons aptly set forth in *Molitor* v. *Kaneland Community Unit Dist. No. 302* (18 Ill. 2d 11, 27-28, *supra*): "Likewise there is a substantial authority in support of our position that the new rule shall apply to the instant case. (*Dooling* v. *Overholser,* (D. C. cir.) 243 F. 2d 825; *Shioutakon* v. *District of Columbia,* (D. C. cir.) 236 F. 2d 666; *Durham* v. *United States* (D. C. cir.) 214 F. 2d 862; *Barker* v. *St. Louis County,* 340 Mo. 986, 104 S. W. 2d 371; *Farior* v. *New England Mortgage Security Co.,* 92 Ala. 176, 9 So. 532; *Haskett* v. *Maxey,* 134 Ind. 182, 33 N.E. 358; *Daucey* v. *Farney,* 173 N. Y. Supp. 530.) At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere *dictum.* Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus, there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it." This view was adopted by the Wisconsin Supreme Court in *Kojis* v. *Doctors Hosp.* (12 Wis. 2d 367, 374, *supra*). Of course, parties to cases which have already been decided and which have already upheld

their divorces could obtain no benefit from the consideration afforded these appellants (*Lyon* v. *Richmond*, 2 Johns. Ch. 51, 59, per KENT, Ch., revd. on other grounds 14 Johns. 501).

The order of the Appellate Division vacating the judgment of annulment and reinstating Mrs. Rosenstiel's injunction action restraining Mr. Rosenstiel from seeking marital relief outside this jurisdiction should be reversed.

In *Wood* v. *Wood* decided herewith, I would modify the order of the Appellate Division to the extent of granting the defendant's counterclaim for annulment. In all other respects I would affirm.

Judges DYE, FULD and VAN VOORHIS concur with Judge BERGAN; Chief Judge DESMOND concurs in part in an opinion; Judge SCILEPPI dissents and votes to reverse in an opinion; Judge BURKE taking no part.

In each action: Order affirmed.

APPENDIX C

Relevant Portions of Petitioner's and Respondent's Briefs in the New York Court of Appeals

(1) Petitioner's Brief in the Court of Appeals

Pp. 42-44:

B. THE DEFENDANT'S JUAREZ DIVORCE DECREE IS NOT ENTITLED TO RECOGNITION IN NEW YORK, BECAUSE THE JUAREZ COURT DID NOT HAVE THE REQUISITE JURISDICTION TO RENDER SUCH A DECREE

1. *The Universal Prerequisite to Comity—Jurisdiction According to the Law of New York—Is Lacking*

As a prerequisite to the recognition in New York of a foreign country decree, it must be established that the rendering court had jurisdiction over the action in the New York sense, and not merely jurisdiction according to the laws of the particular foreign country in which the decree was rendered. (See: *Caldwell* v. *Caldwell, supra,* 298 N.Y. 146, 150; Rabel, *op. cit. supra,* Vol. I, p. 531; Morris, *op. cit. supra,* p. 1008; Griswold, *op. cit. supra,* 65 Harv. L. Rev. 193, 277; Note, 32 Fordham L. Rev. 581, 586, *supra;* Ehrenzweig, "*Conflict of Laws,*" p. 160, *et seq.* [1962]; 58 American Journal of Int. Law 724, 726 [1964].) Thus, even if the Juarez Court had jurisdiction in the Juarez sense that fact is irrelevant on the question of comity; in order for the Juárez decree to be entitled to recognition in New York, the Juárez Court must have been competent by New York standards.

Caldwell v. *Caldwell, supra,* 298 N.Y. 146, is precisely in point. In *Caldwell,* this Court held that a Juárez divorce decree was not entitled to recognition in New York, because

the Juarez Court did not have jurisdiction over the parties and the subject matter, "as we know those terms." (298 N.Y., at p. 150.)

There are no exceptions to the rule that foreign country decrees, in order to be recognized in New York, must have been rendered by a court which is competent in the eyes of the jurisdiction where recognition is sought. Professor Rabel writes as follows (*op. cit. supra,* Vol. I, p. 531):

> "Despite the many confusing differences relating to the jurisdictional requirements of recognition in the enactments and doctrines of the world, there is one condition universally observed, viz., that the court of judgment must have had jurisdiction in the international sense, i.e., according to the conceptions of the forum where recognition is sought."

Clearly, the Juárez court which rendered the plaintiff's divorce decree did not have jurisdiction over the action "according to the conceptions of the forum where recognition is sought," *i.e.,* "as we know those terms." (See *Caldwell* v. *Caldwell, supra,* 298 N.Y. 146, 150. See, also, N.Y. Dom Rel. Law §§170, 230.)

Neither, for that matter, did the Juárez court have sufficient jurisdiction over the divorce action to meet the minimal jurisdictional requirements of any other state in the union. (See statutes listed, *supra,* footnote, p. 19.) Nor did the Juárez court have jurisdiction in the sense required by every civilized country in the world—especially civil law countries which have a close affinity and similarity to Mexico, which, of course, is a civil law jurisdiction. (See,

e.g., Rabel, *op. cit. supra*, Vol. I, pp. 509, *et seq.*; Morris, *op. cit. supra*, p. 304, *et seq.*; Treaty on International Civil Law, Montevideo, *supra*, Art. 59; The Bustamante Code of Private International Law, *supra*, Arts. 52-56; 86 League of Nations Treaty Series 120, 254; Franco-Italian Treaty of June 3, 1930, Art. 11, par. 1.)

Indeed, if any American court were to attempt to assume jurisdiction of a divorce action on such flimsy bases as those on which the Juárez courts purport to assert their jurisdiction, it would amount to an unconstitutional denial of due process. (*Alton* v. *Alton* [C.A. 3d Cir. 1953] 207 F. 2d 667; *Jennings* v. *Jennings* [1948] 251 Ala. 73, 36 So. 2d 236; see, also, Von Mehren, *op. cit. supra*, 45 Mass. Law Quarterly 23, 34.)

In *Alton* v. *Alton, supra*, 207 F. 2d 667, the plaintiff wife, who had formerly lived in Connecticut, took up residence in the Virgin Islands, and lived there for six weeks and a day. She then brought suit for divorce under a local statute which provided that six weeks' residence by a plaintiff prior to filing for a divorce constituted *prima facie* evidence of domicile, and such "residence", coupled with an appearance by the defendant, would give the court jurisdiction over the action. The Virgin Islands law provided that compliance with the foregoing precluded any investigation as to domicile by the court. The defendant waived service of process and appeared generally, by attorney. However, the trial court on its own motion, and indeed, over the objections of the parties, dismissed the action for want of jurisdiction. The Court of Appeals for the Third Circuit af-

firmed the trial court's decision on the ground that it was unconstitutional for one jurisdiction to render a decree affecting the marital status of a domiciliary of another jurisdiction, even though both parties were before the rendering court and neither objected to the jurisdiction of that court. GOODRICH, *J.*, on behalf of the court, wrote as follows (207 F. 2d at p. 677):

> "An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere. . . ."

Accord: *Jennings* v. *Jennings, supra,* 251 Ala. 73, 30 So. 2d 236 (the Alabama Supreme Court held unconstitutional an Alabama statute which permitted its courts to assume jurisdiction, for the purposes of divorce, on the basis of transitory presence of the parties.)

* * * * *

Pp. 51-52:

Moreover, it is important to consider that a Juárez decree, granted on the minimal "contact" resulting from a one day's personal appearance by one party, and an appearance by attorney on behalf of the other party, both

of whom are in reality residents and domiciliaries of New York, may well result in a violation of the Due Process Clause of the United States Constitution when it is sought to enforce such a decree through state action. This is strongly suggested by the results in cases where judgments obtained in sister states, which have applied their own law with respect to matters in which they have an insignificant interest, are sought to be enforced. (See: *Hartford Accident and Indemnity Co.* v. *Delta and Pine Land Co.* [1933] 292 U.S. 143, 150; see, also, *Home Ins. Co.* v. *Dick* [1929] 281 U.S. 402; *Modern Woodsmen of America* v. *Mixer* [1925] 267 U.S. 544, 551.)

The essential point is that if a divorce action were to be treated as a transitory one, the rendering court would be compelled to apply the law of the domicile of the parties. *Home Ins. Co.* v. *Dick, supra,* 281 U.S. 402, is especially apposite. In that case, the United States Supreme Court held it to be a denial of due process for a Texas Court to apply Texas law in a suit on an insurance policy, where all the acts relating to the making of the policy, as well as its performance, had been done in Mexico. The Court deemed it to be juridically insignificant that one of the parties to the action was a resident of Texas. Mr. Justice BRANDEIS, writing for the Court, stated (281 U.S., at p. 410):

> "It [Texas] may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."

Significantly, the choice-of-law question has not arisen in the context of whether a divorce decree is entitled to full

faith and credit. The reason for this absence of authority would seem to lie in the fact that the courts of every state in the union normally refrain from entertaining actions for divorce unless there is a showing of some close connection between the marital res and the forum state. Such a close connection, of course, is a *sine qua non* of the application to the case of the law of the forum.

(2) Respondent's Brief in the Court of Appeals

Pp. 57-58:

2. DUE PROCESS OF LAW.

Subsequent to the argument of this case in the Appellate Division, defendant has invented a constitutional "issue"; he suggests the possibility that if an American court had done what the Chihuahua divorce court did, it would be a "denial of due process" (Def. Br., p. 43); and that the divorce here in issue "may well result in a violation of the Due Process Clause of the United States Constitution when it is sought to enforce such a decree through state action" (Def. Br., p. 51). Neither of these belated and tentative notions requires extensive discussion.

The "due process clause" is not a vague injunction against loose judicial proceedings; it prohibits depriving any "person" of his "life, liberty or property" without "due process of law." Hence, it is only empty phrase-making to claim that the Juarez court "denied due process"—or would have, if it had been an American court—because in talking about due process, it is indispensable to specify the *person* who was deprived, and the *liberty* or

property he was deprived of, without due process of law. The only parties to the Juarez proceeding were plaintiff and her former husband, Kenneth Meredith. Neither of them was deprived of life by the decree, or of liberty, or of property, except that both parties waived certain estate rights and entered into provisions with respect to the payment of alimony to plaintiff. But plaintiff is not complaining of the Juarez court's action, nor could she. Nor is or can the deceased Meredith complain of the Mexican decree. Hence no one was deprived of anything without due process of law. *Alton* v. *Alton,* 207 F. 2d 667 (3d Cir. 1953) (Def. Br., pp. 43-4) is not authority to the contrary. That case voided a provision of the Virgin Islands divorce law on the ground that it violated the Organic Act, and various "due process" remarks were *dicta* not followed by the Supreme Court when it later confirmed the Organic Act holding in *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955).

Nor is there more merit to the suggestion that the due process clause might be violated *if* someone tried to "enforce" the Juarez decree in New York. No one is trying to "enforce" the divorce decree against defendant. Plaintiff's action rests on her marital rights, secured to her by her marriage in this State. This factor makes totally irrelevant the three insurance cases cited by defendant on page 51 of his brief. In each of those cases, the defendant was being deprived of his property without due process, in that the plaintiff was trying to collect on a constitutionally infirm judgment against defendant. Here, the Juarez decree did not run against this defendant, and no one is trying to take anything from him under that decree. Rather, it is

defendant who affirmatively seeks to contest the validity of the divorce, to which he was a stranger, and which was rendered years before he even met plaintiff.

(3) Petitioner's Brief in Support of Motion for Reargument in the Court of Appeals

Pp. 8-12:

IT IS A VIOLATION OF DEFENDANT'S RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION TO RECOGNIZE AS VALID THE JUAREZ DIVORCE DECREE

We urged before this Court that the minimal contacts necessary for a Mexican court to exercise jurisdiction were lacking where plaintiff and her former husband, Meredith, purported to confer jurisdiction upon the Mexican court by mere "submission" (Main Brief, pp. 43, 51). We contended that to recognize the Juarez divorce obtained by plaintiff violated defendant's constitutional rights. This Court, however, did not discuss this important constitutional objection in its decision and we believe that this Court has overlooked controlling authorities which support our position.

The holding that the parties to a matrimonial action for a divorce, citizens of the United States, can confer jurisdiction upon a court of a foreign country by their mere consent without more is an extraordinary extension of the fundamental principles underlying the concept of jurisdiction as it is commonly recognized in Anglo-American tradition.

This Court's decision recognizing that such tenuous ties empower a foreign court to sever the matrimonial relationship of United States citizens is tantamount to per-

mitting divorce by consent where the parties settle in advance questions of property and child custody, agree to a divorce between themselves, and the Court (Mexican) confirms the agreement by what is called a "divorce decree".

This Court overlooked the controlling decision of *Alton* v. *Alton,* 207 F. 2d 667 (3d Cir. 1953), wherein the court stated that in an action for divorce a court cannot confer upon itself jurisdiction by consent of the parties and an attempt to do so violates the due process clause of the United States Constitution. *Certiorari* was granted in the *Alton* case, but it was never heard by the Supreme Court because of an intervening mootness (347 U.S. 911, 610).

In the *Alton* case, the Court of Appeals held that a Virgin Islands divorce statute (§ 9(a)), providing that six weeks' residence in the Virgin Islands by the plaintiff and appearance by the defendant in the action gave the court jurisdiction over a matrimonial action and precluded investigation as to domicile by the court, was unconstitutional because violative of the due process clause of the United States Constitution.

Specifically, the court in *Alton* held that as to nonresidents, the requisite minimal contacts were not present for the court to have jurisdiction. In that case the court held that domicile was the requisite minimal contact required to confer jurisdiction in a matrimonial action, relying upon the Supreme Court decision in *Williams* v. *North Carolina (II),* 325 U.S. 226 (1945).

In New York, although not adhering to the requirement of domicile, this Court required a showing of bona fide

residence and other substantial contacts in France to recognize a divorce decree granted to a New York domiciliary in France. *Gould* v. *Gould,* 235 N.Y. 14 (1923). In addition, as this Court observed in that case, the French court had applied New York law.

Subsequent to the decision in *Alton,* the Supreme Court did hold § 9(a) of the Virgin Islands divorce law invalid in the case of *Granville-Smith* v. *Granville-Smith,* 349 U.S. 1 (1955), but decided that case on the basis that § 9(a) exceeded the powers granted to the Legislature by the Organic Act and therefore did not reach the issue of constitutional infirmity found in the *Alton* case.

Therefore, *Alton* v. *Alton* stands unchallenged and is a clear statement by the United States Court of Appeals that no court can confer upon itself jurisdiction over a matrimonial action without certain minimal contacts and certainly such minimal contacts were not present when plaintiff and her former husband obtained their divorce in Juarez. See also *Home Insurance Company* v. *Dick,* 281 U.S. 397 (1930), wherein the Supreme Court held that it was a violation of due process for Texas to apply its law when all of the acts and contacts relating to the execution and performance of an insurance policy occurred in Mexico, thus showing that courts which apply their own law, but do not have the requisite minimal contacts, act in violation of the due process clause of the United States Constitution.

Plaintiff's principal arguments before this Court with respect to defendant's contention that due process would

be violated by recognizing the Juarez decree consisted of the fact that defendant was not a party to that action and the Juarez decree is not being enforced in New York. (Plaintiff's main brief, pp. 57-58) Obviously the validity of the Juarez decree is a vital necessity to plaintiff in this action. Furthermore the fact that plaintiff and her former husband were the only parties to the Juarez proceeding is not a valid ground for claiming that the constitutional infirmities cannot be raised in this action.

This Court's recent decision in this case holds that the Woods are validly married and the validity of their marriage is directly dependent upon the validity of the Juarez divorce. If this Court found that the Juarez court did not have jurisdiction, then it would of necessity be required to hold that the purported marriage between plaintiff and defendant is a nullity and of course if the purported marriage is a nullity, then *a fortiori* plaintiff loses her claimed dower interest in defendant's New Jersey real property; plaintiff loses her claimed interest in the cooperative apartment owned by the parties; and plaintiff loses her claimed status as defendant's wife with the benefits derived therefrom including the right to share in his estate should she survive him.

Thus, it is clear that the validity of the Juarez decree has a direct bearing upon the property rights and marital duties of the parties in this action and if the decree is a nullity, this Court's recognition of it as being valid deprives the defendant herein of property and liberty without the

due process of law guaranteed by the United States Constitution.

The Juarez decree was void because the Juarez court did not have jurisdiction over the subject matter of the so-called lawsuit in Mexico. Due process of law, as the court in *Alton* v. *Alton* implies, demands the orderly and just administration of law by a duly qualified court of law, and where the court does not have jurisdiction it must follow that there can be no due process of law. This Court's recognition of the validity of that Juarez decree in a suit between the parties herein attempts to confer jurisdiction on the Mexican court where none existed before and this directly affects the property rights and status of the defendant.

In addition, as Judge Scileppi of this Court observed in his dissenting opinion (16 N.Y. 2d, p. 84) there is no "distinction of substance" between Mexican mail order decrees which are held invalid in New York and the Mexican submission decree involved in this case. *Caldwell* v. *Caldwell,* 298 N.Y. 146 (1948). This Court's recognition of the Juarez submission divorce decree which is violative of due process results in an arbitrary and discriminatory application of the law of New York which in the instant case is tantamount to a violation of defendant's right guaranteed by the United States Constitution to the equal protection of the laws.

Defendant, therefore, requests by this motion for reargument that these serious questions concerning the consti-

tutionality of recognizing the Juarez consent divorce decree be reconsidered and the Court reverse its decision because it directly denies defendant both property and freedom in violation of his rights guaranteed by the United States Constitution.

If, however, this Court is of the opinion that defendant's constitutional rights were not violated herein, and adheres to its decision, defendant requests that this Court amend its remittitur to include the statement set forth in the Notice of Motion herein (*supra,* pp. 1-2).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 934

WALTER A. WOOD,

Petitioner,

—*v*—

HELENA A. WOOD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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OPINIONS BELOW

The opinion of the New York Court of Appeals, affirming 5 to 1 (one judge not sitting) the decision of the Appellate Division, is reported at 16 N. Y. 2d 64, 74, 209 N. E. 2d 709, 713, together with the opinion in the companion case of *Rosenstiel* v. *Rosenstiel.* The unanimous decision of the New York Court of Appeals, denying without opinion the motion for reargument or to amend the remittitur, is reported at 16 N. Y. 2d 993.

QUESTIONS PRESENTED

1) Is New York constitutionally required not to recognize a foreign nation divorce decree, rendered in full conformity with that nation's laws upon the appearance of both parties, when the decree is collaterally attacked by a subsequent spouse with knowledge who married on the strength of that decree?

2) Should a petition for certiorari be granted to review alleged federal constitutional issues which were asserted for

the first time on appeal, when state law requires such issues to be raised at trial?

3) Is a petition for certiorari timely where the final order of the state court is entered on July 9, 1965, and the petition filed on January 20, 1966?

STATUTE INVOLVED

28 U. S. C. § 2101(c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT

Petitioner asserts that he has a constitutional right to have New York treat as null and void a marriage he freely contracted—not once but twice—with full knowledge of his wife's prior Mexican divorce. He argues that one who enters such a marriage with full expectation of its *validity* is deprived of his constitutional rights unless his expectation is frustrated by a judicial declaration of *invalidity*. He asks this Court to give constitutional protection to a "marriage-at-will" relationship in which the wife is bound by the marriage contract but the husband is free to terminate it at any time.

The parties to the challenged Mexican divorce proceeding were respondent and her former husband, Kenneth Meredith. Neither of them has attacked that proceeding; indeed, both remarried on the strength of it. Neither ever contended that the Mexican proceeding was a deprivation of due process of law. Meredith died before this action

was commenced (W*284). The only consequence of a successful challenge by petitioner, therefore, will be to destroy an existing marriage, not to restore a prior marriage. Petitioner contends he has a constitutional right to achieve this result.

The New York Court of Appeals thinks otherwise. It explicitly found that the case at bar does not present a federal question. On October 28, 1965, it denied petitioner's motion to amend its remittitur to assert therein that the appeal "presented and necessarily passed upon questions under the United States Constitution". 16 N. Y. 2d 993.

The claim that the case does present federal questions is one that petitioner has only recently espoused. In his pleadings, at trial, and on appeal to the Appellate Division of the New York Supreme Court, petitioner based his claim solely on New York law. He recognized that the United States Constitution does not address itself to New York's right to recognize the divorce decree of a foreign nation. Only in the Court of Appeals did petitioner make cursory reference to the Fourteenth Amendment, and not even the Court of Appeals had the benefit of hearing petitioner's novel theory that "federal common law" precluded New York from recognizing a foreign divorce decree not offensive to its public policy.

We urge this Court to deny the petition for the following reasons: First, petitioner's arguments are supported neither by precedent nor by reason, and the case does not present a federal question. Second, petitioner has waived his right to assert these arguments. Third, the facts of this

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*References in parentheses preceded by "H" and "W" are to pages in the printed appendices filed in the New York Court of Appeals by petitioner and respondent respectively. References preceded by "A. P." are to the Additional Papers printed at the end of the Appendix filed by the petitioner in the New York Court of Appeals. References preceded by "Pet. Br." and "Pet. App." are to pages in petitioner's brief in support of this petition for a writ of certiorari and the printed appendix to that brief.

case do not justify this Court, in its discretion, issuing a writ. Fourth, the petition is not timely.

ARGUMENT

I. Neither the Constitution nor Federal Policy Required New York to Deny Recognition to the Mexican Decree, and No Federal Question Is Presented.

Under the laws of the State of Chihiahuah, Republic of Mexico, the courts of that Mexican state may assert jurisdiction in an action for divorce if the plaintiff is physically present and the defendant appears by attorney (Pet. App. 26). Respondent and her prior husband Meredith followed this procedure, with respondent appearing in person (W. 52-3).

After that divorce, petitioner and respondent met and subsequently were married in France. In procuring the French marriage license, respondent disclosed to the authorities that she was divorced from her prior husband. As the trial court found (W. 53), petitioner knew of the divorce and had every opportunity to learn the details of it before he married respondent, for the first time, in France. Upon the Woods' return to the United States, when the validity of their French marriage was questioned because of a possible failure to meet French residence requirements, the parties procured a license and married again—this time in New York. Before licensing the marriage, New York required the Woods to submit a copy of respondent's Mexican divorce decree to officials at the New York City Corporation Counsel's office, which inspected and approved the decree (W. 498). The parties were duly married after their application for a New York marriage license was granted.

Petitioner claims that this act—and its subsequent ratification by the courts—deprived him of his constitutional rights. According to petitioner, New York should have rejected his application and denied his request, or it should

have permitted him to enter the marital relationship and then retroactively withdrawn that permission. This, we are told, is the result required by the Constitution and "our place in the civilized world" (Pet. Br. 17).

To succeed in his assertion of a deprivation of constitutional rights, petitioner must show some legitimate property interest or expectation which was frustrated by the action of the state. But petitioner has never explained what New York took from him in recognizing the Juarez decree. Did New York deprive petitioner of his constitutional right not to be married to respondent? Did petitioner have a right to expect, at the time of his two marriages to respondent, that she was not free to marry him? Did he have a right to expect that the marriage ceremonies in which he participated and the married life he led with respondent was nothing but sham? Does the Constitution protect petitioner's expectation that a decree he treated and urged the authorities to treat as valid was actually invalid?

We submit that the only reasonable expectancy interest which accrued to petitioner as a result of respondent's Juarez divorce was the expectancy that the divorce was valid and could be relied upon. The trial court found as a fact that petitioner and respondent had this expectation; both "believed that the Mexican divorce was valid in all respects and that the marriage ceremonies which they entered into in France and in New York City duly created the relationship of husband and wife between them, both in law and in fact" (W. 53). Petitioner would be injured if the state subsequently *refused* to recognize the validity of that decree, thereby defeating his expectation and depriving him of the marital status he sought and justifiably assumed to be secure. But when the state recognized the validity of the Juarez decree and upheld petitioner's expectation he was deprived of nothing, and his constitutional rights were not infringed.

The due process clause is not a vague injunction against loose judicial proceedings; it prohibits depriving any "person" of his "life, liberty or property" without "due process of law". Hence, it is only empty phrase-making to claim that the Juarez court "denied due process"—or would have, if it had been an American court—without specifying the *person* who was deprived, and the *liberty* or property of which he was deprived, without due process of law. The only parties to the Juarez proceeding were respondent and her former husband, Kenneth Meredith. Neither of them was deprived of life by the decree, or of liberty, or of property, except that both parties waived certain estate rights and entered into provisions with respect to the payment of alimony to respondent. But respondent is not complaining of the Juarez court's action, nor could she under the New York law of estoppel (*Krause* v. *Krause,* 282 N. Y. 355, 26 N. E. 2d 288 (1940)). Nor is or could the deceased Meredith complain of the Mexican decree. Hence, no one was deprived of anything without due process of law.

There is no more merit to the suggestion that the due process clause might be violated if someone tried to "enforce" the Juarez decree in New York. No one is trying to "enforce" the divorce decree against petitioner. Respondent simply asserted her marital rights, secured to her by her marriage in New York. This factor makes *Home Ins. Co.* v. *Dick,* 281 U. S. 402 (1929), cited by petitioner, totally irrelevant. There defendant was being deprived of his property without due process in that plaintiff was trying to collect on a constitutionally infirm judgment *against defendant.* Here, the Juarez decree did not run against petitioner, and no one is trying to take anything from petitioner under that decree. Rather, it is petitioner who affirmatively seeks to contest the validity of the decree, to which he was a stranger.

Petitioner contends that the decision below conflicts with decisions of this Court and other courts. But petitioner cites no case holding that the Constitution regulates a state's right to recognize any foreign divorce decree, much less a decree rendered on the appearance of both parties in full conformity with the laws of a friendly foreign nation.

It is argued that the Constitution required New York to reject the decree of a foreign country whose jurisdiction was not founded on domicile or residence. Although sister state decrees are constitutionally entitled to full faith and credit, the Constitution does not attempt to regulate state court recognition of the divorce decrees of a foreign country. New York takes the view that a foreign nation's divorce decree will be recognized unless offensive to the state's public policy. *Gould* v. *Gould,* 235 N. Y. 14, 29, 138 N. E. 490, 494 (1923). On that issue, New York is the sole and final arbiter.

New York concluded that the Mexican decree attacked in the case at bar does not offend its public policy (Pet. Ap. 26). While we contend that this conclusion is not open to challenge here, we do not hesitate to assert that this conclusion does not conflict with "commonly held notions . . . throughout the civilized world" (Pet. Br. 6). Mexico does not predicate its jurisdiction on significantly different contacts than are required by others whose decrees receive routine recognition. New York, for example, has since 1862 asserted jurisdiction in matrimonial actions if the parties were married in New York even though they have no other contact with the state (Domestic Relations Law § 170 (2)). Decrees resulting from this assertion of jurisdiction have not been refused recognition by other states; such recognition has not been held to constitute a denial of due process. The constitutionality of this statute was upheld in *David-Zieseness* v. *Zieseness,* 205 Misc. 836, 129 N. Y. S. 2d 649 (Sup. Ct., N. Y. Co. 1954).

The cases cited for the proposition that recognition of this Juarez decree deprives petitioner of property without due process of law do not support that contention. *Alton* v. *Alton,* 207 F. 2d 667 (3d Cir. 1953) rested on the conflict between the Virgin Islands statute and the Organic Act enumerating the territorial legislature's powers. The remark about due process of law is mere dictum which was expressly rejected by the only three Justices of this Court to reach that issue in the subsequent case of *Granville-Smith* v. *Granville-Smith,* 349 U. S. 1 (1955). The majority in that case, as in *Alton,* based their decision on the Organic Act, and did not reach the constitutional issue. Justice Clark in his dissent, joined by Justices Black and Reed, did reach the constitutional argument and dispatched it summarily in the following terms:

> "The constitutional questions presented on brief and at argument involved the Due Process Clause of the Fifth Amendment, the Full Faith and Credit Clause, and the Tenth Amendment. First of all, neither of the Granville-Smiths claims to have been deprived of life, liberty, or property without due process of law. *While the State has an interest in the marital relationship, certainly this interest does not come within the protection of the Due Process Clause.* Likewise, full faith and credit is not applicable. Mrs. Granville-Smith is not asking that this Court make her divorce, if granted, valid in the States. That issue is not here and may never be. All she asks is that the Islands be permitted to proceed under their own law." (349 U. S. 1, 26-27) [Emphasis added].

The second facet of this argument is likewise devoid of support. Petitioner claims that recognition of foreign

decrees rests on the choice of law applied. He argues that the Mexican court's application of Mexican rather than New York law in the divorce action to which he was not a party deprives him of his constitutional rights. But surely the New York courts may determine whether their residents may be affected by the law of another jurisdiction. The only case cited by petitioner is *Hanson* v. *Denckla,* 357 U. S. 235 (1958), where, as petitioner concedes, the decision rested on lack of jurisdiction in the rendering state court, not choice of law. The decree challenged in *Hanson* v. *Denckla, supra,* was a sister-state rather than a foreign nation decree. The question of recognition was whether the Constitution *required* Delaware to recognize the Florida decree, not whether the Constitution would be offended if Delaware had chosen to do so. Furthermore, this Court had first reversed the Florida judgment, holding that it was not valid in Florida under Florida law; here the Mexican decree was concededly valid in Mexico (W. 53).

The final proposition, that the Court should announce a federal common law precluding the recognition of this type of decree, is supported by no authority whatsoever. The concept of federal common law has long been in recession. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938).

Banco Nacional de Cuba v. *Sabbatino,* 376 U. S. 398 (1964), involved the acts of foreign executives, rather than the judgment of foreign courts. Furthermore, the whole thrust of that decision was to avoid damage to the nation's foreign relations by a state court's *refusal* to recognize the acts of a foreign government. No such issue is raised here.

There is no reason why New York should not be permitted to determine questions affecting the status of its own residents and domiciliaries such as this petitioner and this respondent. If New York chooses to recognize a foreign

decree which affects that status, no federal question is presented.

Even if a rule such as that urged by petitioner were to be adopted, it should be applied only in sensitive cases such as those involving recognition of foreign governments where the federal government has a strong interest. Here there is no issue as to the competence of the Mexican court, the legal status of its government, or the friendliness of Mexican-American relations.

We have addressed ourselves to the merits of petitioner's arguments. We contend, however, that these arguments are frivolous and that the case does not present a federal question. A litigant cannot interject a federal question into a case, to give this Court jurisdiction, simply by uttering the magic words "due process of law" or "federal policy". In his recent motion to the New York Court of Appeals, petitioner asked the court to acknowledge that his arguments raise federal questions, even if it rejected those arguments on the merits. The court denied that motion. Its conclusion that no federal question is raised by the case at bar should not be disturbed by this Court.

II. Petitioner May Not Now Raise Issues Which Were Not Presented Before the Case Reached the Court of Appeals.

As we have pointed out above, petitioner made no effort to assert his constitutional rights or to raise any federal questions in his complaint, at trial, or in the Appellate Division.

Petitioner points to certain language in Judge Coleman's opinion to support the claim that the trial court "clearly recognized and considered the federal questions inherent in the case" (Pet. Br. 3). The fact is, however, that Judge Coleman's opinion, in the language quoted at

page 4 of petitioner's brief, simply emphasizes that the case does *not* involve the due process clause of the Fourteenth Amendment or the full faith and credit clause. The opinion contrasts the example of a sister state decree which, in the trial judge's view, might be attacked under the due process clause. It is clear that Judge Coleman's very point was that an attack based on the due process clause could not be made in the instant case, which does not involve a sister state decree.

Moreover, the concept underlying the waiver doctrine is that the party asserting constitutional rights must *raise* the issue in the court of the first instance. The reluctance of appellate courts to consider constitutional issues which have not been considered below stems from a reluctance to declare that a lower court judge has committed error when, in fact, he never had an opportunity to decide the issue in the first place. Thus, regardless of what Judge Coleman may or may not have said in an aside in his opinion, the significant fact is that petitioner never claimed that his constitutional rights were involved until the case reached the Court of Appeals, three years after the complaint was served.

Petitioner claims that until the Appellate Division recognized the Juarez decree his constitutional rights were not denied and, therefore, he could not raise the constitutional issue until that time. But the reasoning underlying the waiver doctrine is that only if a litigant informs the courts that a prospective ruling might deprive him of his constitutional rights can an adverse ruling be considered erroneous. If petitioner's view of the law were correct, a litigant would never be required to raise constitutional issues at trial, for only after the trial court reached a decision could his rights be infringed. The waiver doctrine would thus be meaningless.

Furthermore, it should be noted that the State of New York recognized this Mexican decree long before the Ap-

pellate Division's decision. The "deprivation of rights" first occurred when the state officials granted the marriage license to the parties, after examining respondent's Mexican decree. Even under petitioner's view, therefore, he had ample reason to raise this issue at trial.

New York has always followed the rule that constitutional issues cannot be raised for the first time on appeal; a constitutional issue not raised at trial is waived.

> "Constitutional questions cannot for the first time be raised in this court. [Citations omitted.]" *Nathan* v. *Equitable Trust Company,* 250 N. Y. 250, 253, 165 NE 282 (1929).

The rule has been applied consistently, barring attempts to raise constitutional issues for the first time in the Appellate Division as well as in the Court of Appeals. *Eddy, Inc.* v. *Fidelity & Deposit Company,* 265 N. Y. 276, 282, 192 N. E. 410, 412 (1934); *Marie Von Diezelski* v. *Food Fair Stores, Inc.,* 18 A. D. 2d 724, 236 N. Y. S. 2d 603 (2d Dep't 1962); *Matter of Robusto,* 277 App. Div. 1008, 100 N. Y. S. 2d 370 (2d Dep't 1950).

This Court has consistently refused to consider constitutional issues not raised at trial if the state court follows such a policy. *Beck* v. *Washington,* 369 U. S. 541 (1962).

Each of petitioner's arguments is a constitutional argument, resting on either the due process clause or the supremacy clause. None was raised at trial or in the Appellate Division. Under these circumstances, the petition should be denied.

III. This Court, in the Exercise of its Discretion, Should Deny the Petition

In urging this Court to exercise its discretion by denying this petition, we point first of all to the basic inequity of petitioner's position. He knew of respondent's prior Mexi-

can divorce. He urged French and then New York officials to recognize the validity of that divorce by granting him a license to marry respondent. During the years he lived with respondent as man and wife, his conduct asserted to the world that the prior divorce was valid. Now, when it suits his convenience, he attacks the Mexican decree upon which he and respondent relied for so long.

So offensive to the conscience is this legal sleight-of-hand that at least two of the five justices of the Appellate Division expressed the view that petitioner is estopped to challenge the Mexican decree (A. P. 12-15). The other justices and the Court of Appeals did not reach the issue of estoppel. Petitioner himself recognizes that his argument fails if the principle of estoppel applies; he has framed the "question presented" on the assumption that he is not estopped (Pet. Br. 2). We believe that the equitable considerations underlying the doctrine of estoppel are present in this case and are sufficient to warrant a discretionary denial of the petition.

If petitioner is correct and he is not estopped, his overall position is even more unjust. For it is clear that, as a matter of state law, repsondent, having secured the Mexican divorce, is estopped from challenging it. *Krause* v. *Krause, supra; Packer* v. *Packer,* 6 A. D. 2d 464, 179 N. Y. S. 2d 801 (1st Dep't 1958). Respondent could not secure a declaration of nullity of her marriage to petitioner, but petitioner could at any time. Thus he is in the happy position of having a marriage-at-will relationship. We respectfully suggest that this Court has discretion to refuse to consider a legal theory leading to such a bizarre and inequitable result.

Furthermore, we believe that the arguments asserted in Points I and II—that there is no injury because no expectation was frustrated, and that petitioner should not be permitted to raise the constitutional "issues" for the first

time at such a late date—not only refute petitioner's arguments on the merits but also justify a discretionary denial of the petition. The afterthought of this remote and metaphysical constitutional injury does not deserve the serious consideration of this Court.

Finally, we remind the Court that the marital status of more than 200,000 New Yorkers, and countless thousands in other states, would be jeopardized by the reversal of the decision of the New York Court of Appeals (Pet. App. 21). That decision has prompted New York to move for the first time toward a revision of its ancient divorce law, and legislation to that effect is now pending before the New York Legislature. Under these circumstances, and particularly at this time, we respectfully urge the Court to refrain from entering the delicate area of matrimonial law, which has traditionally been reserved to the states (*Williams* v. *North Carolina* [II] 325 U. S. 226, 233 (1945)).

IV. The Petition Is Not Timely, and Should Be Dismissed

The petition for certiorari was required to be filed "within ninety days after the entry of [the] judgment or decree." 28 U. S. C. § 2101(c). The Court of Appeals entered its final order on July 9, 1965. This petition was not filed until January 20, 1966; accordingly, it is untimely.

Certain ministerial acts occurred in the lower court subsequent to the entry of the order by the Court of Appeals, but none affected or could have affected the determination made in the Court of Appeals. On July 23, 1965, the Court of Appeals' order was filed in the office of the Clerk of the County of New York, and on August 13 an order was entered in the New York County Clerk's office making the order of the Court of Appeals the order of the New York Supreme Court. Petitioner himself relies on July 9 as the date of the judgment or decree sought to be reviewed (Pet.

Br. 2). Regardless on which of the above dates started the running of the 90 days within which to file the petition, the time had run long before this petition was filed on January 20, 1966.

Although final judgment was not entered *in the lower court* until later, this entry of judgment was a mechanical act by the clerk which in no way affects the rights of the parties or extends their time to seek review here. So this Court has explicity held. As the leading text writers have commented:

> "The order or judgment of the highest state court is controlling as to the running of the time even though under the state practice (as in New York and Massachusetts) the actual judgment is that entered by an inferior state court on remand, remittitur, or rescript. *Department of Banking* v. *Pink,* 317 U. S. 264; *Cole* v. *Violette,* 319 U. S. 581. In such cases the function of the lower state court is the ministerial one of entering the judgment . . .". Stern & Gressman, *Supreme Court Practice* 304 (3d. ed., 1962).

Petitioner can only contend that the 90 days did not begin to run until the Court of Appeals denied his motion for reargument and to amend the remittitur. The statute (28 U. S. C. § 2101(c)) makes no such provision, but it has been said that "If the rules of the lower court allow a petition for rehearing or new trial to be filed within a prescribed number of days, and the petition is filed within that period, the 90 days begins to run from the date of the lower courts order denying the petition for rehearing." Stern & Gressman, *op. cit.,* p. 205. However, New York law provides no time limit for making such a motion. Cohen & Karger, *Powers of the New York Court of Appeals* 443 (1952). If the decision denying the motion for reargument is the key date, therefore, a petition for certiorari would be timely

even many months after the decision for which review is sought.

As for the motion to amend the remittitur, the treatises state:

> ". . . a motion for a change in the court's opinion or for an amendment of a remittitur (in New York) to add the statement that a federal question was presented and necessarily decided does not extend the time, since such a motion would not affect the judgment already entered. *Department of Banking* v. *Pink,* 317 U. S. 264, 266." Stern & Gressman, *op. cit.,* p. 206.

Perhaps the time limit should be tolled after the making of a motion for reargument, pending its determination. Here the motion was brought on October 1, 1965, and denied by the Court of Appeals on October 28, 1965. Even if these 28 days are excluded from the computation, and even if the time is computed from August 13, 1965, the most remote of the possible statutory dates, the 90 days expired long before this petition for certiorari was filed on January 20, 1966.

The petition is untimely and should be dismissed.

CONCLUSION

For the reasons given, the petition should be dismissed as untimely or denied.

Respectfully submitted,

SIMON H. RIFKIND
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